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NO._____

IN THE

Supreme Court of the United States

October Term, 1983

LOUIE L. WAINWRIGHT
Secretary,
Florida Department of Corrections,

Petitioner,

vs.

HOWARD VIRGIL LEE DOUGLAS,

Respondent.

Petition for Writ of Certiorari
to the United States
Court of Appeals for the
Eleventh Circuit

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QUESTION PRESENTED

WHETHER, DESPITE THE PREVIOUS GRANT OF CERTIORARI IN THIS CASE (NO. 83-817) VACATING THE JUDGMENT OF THE COURT OF APPEALS AND REMANDING THE CAUSE FOR FURTHER CONSIDERATION IN LIGHT OF STRICKLAND V. WASHINGTON, 466 U.S.___, (1984), THE COURT OF APPEALS PROPERLY APPLIED THE PRINCIPLES OF THAT CASE TO REINSTATE ITS ORIGINAL AND IDENTICAL JUDGMENT?

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I

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984). A 1-11. That decision was on remand from an order of this Court dated July 5, 1984, in Wainwright v. Douglas, Case No. 83-817. The decision of the Court of Appeals containing the judgment which was vacated by the writ of certiorari is reported at Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983). Other pertinent opinions are reported at Douglas v. Wainwright, 521 F.Supp. 790 (M.D. Fla. 1981); Douglas v. State, 328 So.2d 18 (Fla. 1976), cert. den. 429 U.S. 871 (1976), and Douglas v. State, 373 So.2d 985 (Fla. 1979).

II

JURISDICTION

The United States Court of Appeals

for the Eleventh Circuit by a two-to-one decision, on August 1, 1984, on remand from this Court, adhered to and reinstated the original panel opinion appearing at Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983). On that same date, the Court of Appeals issued its judgment in the cause as mandate.

The State filed a motion to recall mandate, and on August 30, 1984, mandate of the appellate court was recalled and further issuance thereof stayed until October 1, 1984, pending the timely filing of this petition.

The jurisdiction of this Honorable Court is based on 28 U.S.C. §1254(1), inasmuch as the Court of Appeals reversed in part the district court's decision in a habeas corpus proceeding brought under 28 U.S.C. §2254.

III

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, where district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV of the Constitution of the United States provides *inter alia*, that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. §2254(a) provides that:

> "The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

IV

STATEMENT OF THE CASE

The facts material to consideration of the question presented are identical to those appearing in our first petition in Case No. 83-817 and accordingly, will not be needlessly repeated here. Insofar

as a statement of the posture of this particular cause is concerned, Petitioner notes that on July 5, 1984, this Court granted our petition for a writ of certiorari, vacated the judgment of the Court of Appeals on the ineffective assistance of counsel issue and remanded the cause for further consideration in light of Strickland v. Washington, 466 U.S. ___, (1984). This Court also granted Douglas' petition for a writ of certiorari in Case No. 83-995, vacated the judgment of the Court of Appeals on the public trial issue and remanded for further consideration in light of Waller v. Georgia, 467 U.S.___, (1984).

On remand, the Court of Appeals, on August 1, 1984, reaffirmed its judgment on both issues and reinstated the original panel opinion. A 1-11.

V

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the court of first instance was a petition for writ of habeas corpus filed pursuant to Title 28, §2254 U.S.C.

VI
REASONS FOR GRANTING THE WRIT

The best and obvious reasons for granting another writ of certiorari are the factors which motivated the Court to grant the writ previously on July 5, 1984, Case No. 83-817. In fact, the motivation to review the judgment of the court of appeals is perhaps greater now than it was before. We say this because, in our view, the new judgment of the court of appeals seems to have been entered with little or no compliance with or respect to this Court's order.

Treating Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 (1984), as something akin to an advisory opinion, the court of appeals, in three mere paragraphs of judicial opinion, rather perfunctorily summarized this Court's holding, echoed conclusory quotations from its earlier opinion, and adhered to its belief

that Washington was unnecessary to determine that Douglas was denied effective assistance of counsel. In considering a decision of this Court which was obviously rendered in response to the need for guidance on the issue, see 104 S.Ct. at 2062, 2063, and coincidentally directed to a decision of the Eleventh Circuit Court of Appeals, that tribunal could only glean that Washington represented an identification of two components which make up a general ineffective assistance of counsel claim. "[T]he defendant must demonstrate (1) that counsel's performance 'fell below an objective standard of reasonableness,' id. at 4570, and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.' Id. at 4572." A-8. Regarding counsel's performance, the court of

appeals did nothing more than reiterate that his ineffectiveness cried out from a reading of a trial transcript and accordingly concluded that the first prong of this Court's test was satisfied.

As to the prejudice aspect, the court of appeals repeated its notion that nothing this Court could do (or did) in Strickland v. Washington, would have any effect on its determination that regardless of the standard employed, Douglas suffered prejudice to a degree even greater than that contemplated by this Court.

With all due respect to the court of appeals, it is your Petitioner's sincere belief that the above does not represent the proper function of a court of appeals when its judgment on a particular issue has been vacated and the cause sent back for further consideration in light of a decision of

this Court on an issue "not previously considered in any generality." 104 S.Ct. at 2062. Surely this Court intended more than to have a judgment it has vacated so easily revived by the process of repeated assertion. It is suggested that the very least the court of appeals could have done was to base its judgment on an in-depth analysis of Strickland v. Washington, with application thereof to the facts in this case. The result should have been a judicial opinion reciting not only in what particulars the performance of counsel was unreasonable during the penalty phase of trial but also, and most importantly, identifying the prejudice that actually (not conceivably) ensued. By resurrecting its panel opinion without any meaningful consideration of Strickland v. Washington, the court of appeals has actually provided more stimulus to review the cause than

was present before.

Consideration of Washington in light of the instant facts quickly shows that the court of appeals incorrectly decided the issue. This Court considered the benchmark for judging claims for ineffectiveness as whether the conduct of counsel "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 104 S.Ct. at 2064. In order for a defendant to succeed on a claim of ineffectiveness of counsel so as to obtain a reversal of conviction or death sentence, this Court held that he must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. It is necessary to show that the errors, if any, were "so serious as to deprive the defendant of a fair trial, a trial whose

result is reliable." Id. This Court rejected the notion that rigid guidelines are to be utilized when assessing such a claim and instead held that the measure of an attorney's performance should be predicated upon reasonableness under prevailing professional norms. The Court provided clear direction to lower state and federal courts requiring that judicial scrutiny of counsel's performance must be highly deferential. The lower courts were clearly directed that every effort must be made to eliminate the distorting effects of hindsight and to try and reconstruct circumstances and evaluate conduct based on those circumstances as they existed at the time. Requirements were imposed that strong presumptions be afforded to the idea that counsel acted reasonably and thus effectively. Emphasis was placed on strategic choices made after thorough

investigation and that those choices were virtually unchallengable, and a particular decision not to investigate must be assessed for reasonableness considering all the circumstances and applying a heavy measure of deference to the attorney's judgments.

Most importantly, it was stated that when a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In this context, to the extent that an appellate court independently reweighs the evidence, it too was bound by that process. "[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent

the errors." 104 S.Ct. at 2069.

Even with the few principles mentioned above, it is at once seen that the court of appeals failed to properly apply them to the facts in this cause. As we stated in our earlier petition, the court of appeals concluded that ineffective assistance of counsel resulted since Douglas' lawyer did absolutely nothing in terms of preparation for the penalty phase of the trial and thus produced nothing in mitigation on Douglas' behalf. The lower court also found that, assuming no such evidence of mitigation was in existence, certain remarks of counsel to the alleged effect that Douglas was a bad person and/or that there was no evidence in mitigation necessarily caused the sentencer to fail to follow the jury recommendation of life.

In the first instance,the opinion of the court of appeals portrays counsel

as an uncaring, non-acting, legal representative functioning in a pro forma capacity at best. This determination overlooks the fact that attorney Kirkland was a veteran attorney in Polk County, Florida, experienced in defending persons charged with crimes. He was privately retained and was assisted by attorney Storey who had been an assistant United States Attorney. Douglas v. Wainwright, 521 F.2d 790 (M.D. Fla. 1981). Kirkland also was a former assistant United States Attorney and most importantly, he had represented Douglas in prior cases. (Transcript of July 17, 1979, motion for post-conviction relief hearing, p.12) Despite the experience and background of both attorneys, the court of appeals observed (twice) that the ineffectiveness "cried out" from a reading of the transcript. The court failed to note how or why this ineffectiveness was so

blatant, and this is interesting since even to this date, neither Douglas nor any other acting on his behalf has even suggested that there was something in mitigation that could have been presented for the jury's consideration. It is accordingly extremely difficult to find that counsel's performance was not reasonable under the circumstances.

Of greater moment is consideration of the prejudice prong of the Washington test. Assuming arguendo only that the attorneys' performance was unreasonable and thus constitutionally deficient, there can be no showing that actual prejudice resulted to Douglas since at that stage of the proceedings, the only business at hand was a recommendation of sentence from the jury. Obviously, since the jury recommended that Douglas be imprisoned for life and did not recommend that he be sentenced to death, prejudice

simply did not exist; Douglas received the very best possible.

The court of appeals implicitly recognized either that there was no evidence in mitigation or, that in any event, the jury did the most favorable thing it could, for it then found ineffectiveness in terms of the effect on the sentencing judge caused by certain remarks of counsel. The lower court faulted counsel for emphasizing the lack of mitigating evidence and "announcing" that Douglas was a "bad person." Determining the existence of readily discernible and actual prejudice, the court reasoned that the jury did not hear the remarks and they recommended life imprisonment; the judge heard the same evidence plus the remarks and imposed the sentence of death. The conclusion is therefore that the remarks alone caused the sentencer to impose the sen-

tence of death and, thus, the prejudice prong was satisfied. We submit that in this instance of alleged ineffectiveness, neither the performance component nor the prejudice component can be satisfied by Douglas. A review of the same transcript that was available to the court of appeals reveals only that counsel was complaining about the shortness of time and the lack of opportunity to prepare, and was otherwise portraying him and his client as the object of a rush to judgment. It was this flavor of the proceedings that caused the district court to rule that defense counsel's statements indicating a lack of understanding of procedure and importance of the proceeding could not be taken at face value because "experience indicates that some people depreciate their own knowledge and ability as a trial tactic for persuasive reasons." Douglas v. Wainwright, 521 F.2d at 807.

The "bad person" remark is incompletely set forth and incorrectly interpreted in the opinion of the court of appeals. The trial court did not suggest that counsel put Douglas' mother on the stand. Rather, counsel inquired of the court whether it would allow Douglas' mother to take the stand and testify: "[I] don't want my boy to go to the electric chair." (Transcript of trial, p.612) The trial court only responded that: "She could testify that he had been a good boy, if that be the case, and, of course, we all know he's . . ." Id. Counsel then interrupted the trial court and extended the judge's observation with the rather obvious conclusion that by virtue of what had just transpired and his past criminal history, Douglas hadn't been a good boy. Counsel strongly wanted to deny the state the opportunity to cross-examine Douglas about his past record--a

reasonable if not a required tactic.

To conclude that these remarks represented constitutionally ineffective assistance of counsel and to again conclude that Strickland v. Washington leaves that determination unaffected is to simply either ignore or misunderstand this Court's decision. In the first place, all such remarks were made almost four months prior to sentencing. Secondly, if the remarks had any effect on the sentencer whatsoever, it appears to have been pointedly contrary to that ascribed by the panel opinion. The trial judge appears to have engaged in a personal quest to discover something upon which to justify a reduction of sentence to life imprisonment. Indeed, apparently surprised that Douglas did not take the stand "at least during the sentencing procedure. . ." (Transcript of trial p.749), the trial judge requested a

presentence investigation report for the express purpose of seeing if there were any mitigating circumstances in existence which would have enabled him to reduce the sentence which, under the facts and circumstances of this case, he was obliged to impose. (Transcript of trial p.758). It is therefore submitted that a fair interpretation of the sentencing proceedings reflect that counsel's strategy was to engender sympathy in the mind of the sentencing judge and, to the extent possible, counsel was successful.

Because the findings of fact in support of the sentence (Transcript of trial 757,759) reflect that the sentence (1) was imposed based only upon the facts and circumstances of the case, (2) would probably have been reduced to life had the sentencer found anything in mitigation, and (3) because there is absolute-

ly no indication that the state trial judge was in any way improperly influenced by comments of counsel, it is plainly obvious that no prejudice resulted from the remarks made by Douglas' lawyer. Consequently, neither the performance component nor the prejudice component is met.

Finally, the determination displayed by the court of appeals in this particular case becomes both emphatic and questionable in light of two of its decisions rendered subsequent to this Court's order of remand.

In a non-capital case, Boykins v. Wainwright, 737 F.2d 1539 (11th Cir 1984), in response to specific claims of demonstrated omissions on behalf of counsel, the court of appeals had no difficulty whatsoever in analyzing Washington and conclusively rejecting the notion that the omissions could have conceivably

affected the outcome. Interestingly, the court skipped over the performance component and dealt solely with the prejudice aspect in reaching its decision.

Most recently in a capital case which ultimately resulted in execution of the defendant, at issue was the alleged effect of certain remarks of the prosecutor made at the sentencing portion of trial. Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984). At a trial in which the defendant waived an advisory jury, the prosecutor made pointed and repeated requests for the penalty of death to be imposed and offered much in the line of philosophic, sympathetic, and moralistic exhortations in his attempt to persuade the trial judge to impose the penalty of death. That particular panel of the court of appeals, which incidentially had as a member, the dissenting judge in Douglas, found no

indication that a capital sentencing judge in Florida could not cull out any improper considerations and disregard them. In this case, the remarks were presumed improper and assumed as a matter of law and fact to have prejudiced Douglas--to death. We simply cannot reconcile the two conflicting notions of the court.

In conclusion, the court of appeals, in almost a recalcitrant manner, continues to believe that Douglas failed to receive constitutionally effective assistance of counsel. The very best the lower court has provided is a brief duplication of its judgment which gave rise to the grant of certiorari in the first place. Since there now exists more complusion to grant review, it is respectfully submitted that the Court should not only again grant the writ but this time, summarily reverse the

Eleventh Circuit Court of Appeals, vacate its judgment on this issue and direct that tribunal to affirm the district court in its denial of habeas corpus on this claim.

Perhaps the action of the court of appeals warrants the application of the general admonitory considerations found in Hutto v. Davis, 454 U.S 370 (1982).

Respectfully submitted on this_____ day of September, 1984.

Richard W. Prospect
Assistant Attorney General

A P P E N D I X

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 81-5927

HOWARD VIRGIL LEE DOUGLAS,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation,
and DAVID H. BRIERTON, Superintendent
of Florida State Prison at Starke,
Florida,

Respondents-Appellees.

Appeal from the United States District
Court for the Middle District of Florida

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES
(August 1, 1984)

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The Supreme Court granted the petition for writ of certiorari in this case, vacating our judgment in Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), and remanded for further consider-

ation in light of Waller v. Georgia, 52 U.S.L.W. 4618 (May 21, 1984) and Strickland v. Washington, 52 U.S.L.W. 4565 (May 14, 1984). Because we find that Waller and Strickland do not significantly change the basis of our holding in Douglas, we continue to abide by our prior decision.

I. THE PUBLIC TRIAL ISSUE

In Douglas, as did the Supreme Court in Waller, we looked to the Court's prior holdings on the first amendment right to attend criminal trials for guidance in deciding the scope of a defendant's sixth amendment right to a public trial. We identified several purposes of the public trial guarantee: allowing the public to see that a defendant is fairly dealt with, encouraging trial participants to perform their duties more conscientiously, discouraging perjury, and bringing forth witnesses who

might not otherwise testify. 714 F.2d at 1541-42. The Court's opinion in Waller focused on basically the same aims of the guarantee as those identified in Douglas. 52 U.S.L.W. at 4619-20.

Likewise, we find Waller and Douglas in argeement as to the stringent test that must be met for a complete closure to be justified. In Douglas, the panel relied on Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), in concluding that complete closure is "proscribed absent a most compelling justification," 714 F.2d at 1540 , and that a court must hold a hearing and articulate specific findings before ordering either a total or partial closure, id. at 1545. The Waller Court articulated a very similar test:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher

> values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

52 U.S.L.W. at 4619 (quoting Press-Enterprise Co. v. Superior Court, 52 U.S.L.W. 4113, 4115-16 (June 18, 1984)). The Court further noted that the test articulated in Waller was in accord with its holding in Globe Newspaper Co., the case relied upon by the panel in Douglas.

The different results in Douglas and Waller are thus not attributable to the application of differing legal standards, but to the application of the same legal standards to dissimilar facts. The most important distinguishing factor is that Waller involved a total closure, with only the parties, lawyers, witnesses, and court personnel present, the press and public specifically having been ex-

cluded, while Douglas entailed only a partial closure, as the press and family members of the defendant, witness, and decedent were all allowed to remain. Moreover, the closure in Waller was for the entire seven days of the suppression hearing although the playing of the disputed tapes lasted only two-and-one-half hours, whereas in Douglas the partial closure was limited to the one witness' testimony. Douglas, therefore, presented this Court with a fact situation different and unique from that faced by the Waller Court.

Because only a partial closure was involved in Douglas, we relied upon the binding precedent of Aaron v Capps, 507 F.2d 685 (5th Cir. 1975),[1] which had held that where a partial closure is involved, a court must look to the particular circumstances to see if the defendant still received the safeguards

of the public trial guarantee. Id. at 688. In Aaron, the court held that no constitutional violation had occurred because, inter alia, members of the press and the defendant's relatives and clergymen were present at the trial. As in Aaron, the Douglas panel found that the impact of the closure was "not a kind presented when a proceeding is totally closed to the public," 714 F.2d at 1544, and therefore only a "substantial" rather than "compelling" reason for the closure was necessary. Id. The panel further found that a substantial reason -- protection of of the witness from unnecessary insult to her dignity -- existed that justified the partial closure. Id. at 1544-45.

Douglas thus involved an application of the general sixth amendment public trial guarantee to the specific situation of a partial closure, a situation not

addressed in Waller. We do not read Waller as disapproving of Aaron's adaptation of the general standards governing closures, standards on which Douglas and Waller are in accord,[2] to a case where only a partial closure is involved and at least some access by the public is retained. Consequently, we reaffirm the denial of habeas relief on the public trial issue.

II. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The Court also remanded for further consideration in light of its holding in Strickland v. Washington, 52 U.S.L.W. 4565 (May 14, 1984). In the panel opinion we held that counsel's performance at the penalty phase constituted ineffective assistance warranting habeas relief.

In Washington, the Court identified two components of a general ineffective assistance of counsel claim: the defen-

dant must demonstrate (1) that counsel's performance "fell below an objective standard of reasonableness," id. at 4570, and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 4572. Moreover, the defendant must satisfy both the performance and prejudice prongs to be entitled to relief. Id. at 4573.

In the panel opinion, we found that defense counsel's performance had fallen below a standard of reasonableness; indeed, we observed that "counsel's ineffectiveness cries out from a reading of the transcript." 714 F.2d at 1557. The first prong of the Washington test was thus satisfied in Douglas.

As to the prejudice prong, we noted in our opinion that Washington was before the Supreme Court and that the circuits were in conflict as to what standard of

prejudice was to be used. We further explained, however, that we did not need to withhold our decision until the Supreme Court decided Washington, because "under virtually any standard, prejudice is evident on the face of the record." Id. Later in the opinion, we expressly stated that counsel's ineffectiveness created a "great 'likelihood that counsel's inadequancy affected the outcome of the trial,'" id. at 1558, thus satisfying a standard even more strict than Washington's "reasonable probability" standard, see 52 U.S.L.W. at 4572. We therefore reaffirm our original holding that the district court erred in denying habeas corpus relief on the ineffective assistance of counsel claim.

For the foregoing reasons the panel opinion is reinstated.

1 The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

2 As did the Waller court, the Douglas panel found that "an opportunity to be heard and adequate findings are required where any closure of the trial is contemplated and the defendant objects and requests an opportunity to be heard." 714 F.2d at 1546. See also Waller, 52 U.S.L.W. at 4619. The defendant in Douglas, however, had failed to specifically object to the absence of a hearing or findings, resulting in procedural default. 714 F.2d at 1546; see also Wainwright v. Sykes, 433 U.S. 72 (1977).

No. 81-5927 - Douglas v. Wainwright

RONEY, Circuit Judge, dissenting:

I dissent for the reasons set forth in my dissent to the original panel opinion. Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983).